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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 407

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Petitioner,

—against—

SOUTHWESTERN SHIPPING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, County of New York, entered on July 31, 1959 in favor of Respondent against Petitioner in accordance with the remittitur of the Court of Appeals of the State of New York dated July 8, 1959. Under the usual practice of New York, the Court of Appeals has remitted the record in the case to the Supreme Court, New York County.

Since the institution of the action the name of petitioner has been changed from The National City Bank

of New York to The First National City Bank of New York.

Reference to Opinions Below

The opinion of the Supreme Court, New York County (the trial court) is officially reported at 11 Misc. 2d 397 and is unofficially reported at 173 N. Y. S. 2d 509. A copy of that opinion is appended hereto as Appendix A.

The judgment and order of the Supreme Court, New York County were unanimously affirmed by the Appellate Division of the Supreme Court, First Judicial Department without opinion. The memorandum of affirmance of the Appellate Division is reported officially at 6 App. Div. 2d 1036, and is reported unofficially at 178 N. Y. S. 2d 1019. It is appended hereto as Appendix B.

The opinion of the Court of Appeals of the State of New York has not yet been reported either officially or unofficially. A copy of the unrevised and uncorrected opinion of that Court (designated by the Court as "Not for Publication") is appended hereto as Appendix C.

Statement of Jurisdiction

The jurisdiction of this Court is invoked under that portion of Title 28 U. S. C. Section 1257(3), which reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could

be had, may be reviewed by the Supreme Court as follows:

* * * *

"(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The final judgment of the Supreme Court, New York County which is sought to be reviewed is dated July 31, 1959 and was entered on the same date. A copy of this judgment is appended hereto as Appendix D. It was based upon the remittitur of the Court of Appeals of the State of New York which is dated July 8, 1959 and which was entered on that date. Under the New York practice a judgment is not rendered by the highest court—the Court of Appeals. No application for a rehearing was made.

The federal question sought to be reviewed was first raised by petitioner in its pleading prior to trial. In substance this affirmative defense pleaded that plaintiff was suing to enforce an exchange contract which violated the foreign exchange control laws of Italy; that the exchange contract was illegal and void under the laws of Italy; and that as such it was

". . . contrary to the public policy of the United States of America and the State of New York and unenforceable in the Courts of either." (R. 77)

The precise federal question at issue was the meaning and application of the first sentence of Article

VIII, Section 2(b) of the Articles of Agreement of the International Monetary Fund (commonly referred to as the "Bretton Woods Agreement") (60 Stat. 1401) which reads as follows:

> "Section 2 . . .
>
> (b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member . . ."

Congress has provided by statute that this provision shall have full force and effect in the United States. 59 Stat. 516, 22 U. S. C. §286 h.

At the trial this federal question was raised by plaintiff on its motion to dismiss the affirmative defense after defendant had rested. (R. 1163, 1181-1218) It was raised again at the trial by petitioner's motion for a directed verdict based upon its affirmative defense. (R. 1313-1315) This motion was first made prior to the submission of the case to the jury and was renewed after the verdict had been brought in. (R. 1391)

The Supreme Court, New York County wrote a lengthy opinion in which it denied plaintiff's motion to dismiss the affirmative defense and granted defendant's motion for a directed verdict on its affirmative defense as a matter of law. (R. 1633) The decision of the Supreme Court, New York County is based in part upon the Bretton Woods Agreement. (R. 1618-1625) The Appellate Division did not write an opin-

ion in affirming the Supreme Court. The Court of Appeals reversed the judgment below and held that under the common law of New York petitioner could not, because of its status in the transaction, raise the defense that the Bretton Woods Agreement precluded a recovery by the respondent.

There is appended hereto as Appendix E portions of the record showing in more detail how the federal question was raised.

The Questions Presented

The following federal questions of substance are presented by the record in this case:

1. Has not the State of New York improperly superseded the policy of the United States as set forth in Article VIII, Section 2(b) of the Bretton Woods International Monetary Agreement and Title 22 U. S. C. Section 286 h by so interpreting its State public policy and so construing the State common law as to refuse petitioner the right to assert a defense based upon the international Agreement of the United States?

2. Has not the New York Court of Appeals placed a construction on the first sentence of Article VIII, Section 2(b) of the Bretton Woods International Monetary Agreement which is inconsistent with the construction given to the provision by the courts of other signatory countries and violative of the international commitment of the United States?

The Statute and International Agreement

There are set forth in Appendices F and G hereto the pertinent provisions of the Bretton Woods Agreement Act, 59 Stat. 512, Title 22 U. S. C. Section 286, and the pertinent provisions of the Articles of Agreement of the International Monetary Fund, 60 Stat. 1401.

Statement of the Case

In 1951 two Italian concerns named Garmoja and Sicca Dante Corti (hereinafter called Corti) entered into a foreign currency contract in Italy. Garmoja was to deposit 23,310,000 lire in an Italian bank for the account of Corti. Corti was to make available to Garmoja in New York City the equivalent amount of $37,222. (R. 506-507) The only possible purpose of this arrangement was to circumvent the Italian foreign exchange regulations which required a license to remit dollars for any import transaction.

Garmoja wanted the dollars to buy some fatty acids, but it did not have the necessary exchange license from the Italian authorities. Corti did have a license to remit $37,222 to an American citizen named Armand Anlyan in connection with a totally different transaction involving wool rags. The agreement between Garmoja and Corti in substance contemplated the purchase in Italy by Garmoja of United States dollars with delivery to be made in New York City.

Corti was to obtain from Anlyan (its New York agent to whom it could remit dollars under the valid exchange license) a letter addressed by Anlyan to the petitioner Bank giving it irrevocable instructions to

pay respondent Southwestern Shipping Company $37,222 which the Bank was to receive for Anlyan's account. Corti delivered such a letter in Italy to Garmoja. The scheme was that Southwestern would lodge this assignment letter with the petitioner Bank so that when the dollar remittance was made from Italy pursuant to the license the dollars would be diverted from the use permitted by the license and be paid in New York to respondent Southwestern.

Petitioner pleaded in its affirmative defense that Southwestern "was acting solely as agent for Garmoja" in this transaction. The trial judge so found as a fact (R. 1608) and the Court of Appeals has assumed the correctness of this finding, which is amply supported in the record by admissions of Mr. Garavaglia, who was a principal owner, officer and director of both Garmoja and Southwestern (R. 743-746); and by admissions of Mr. Fanelli, who handled the transaction for Southwestern. (R. 274, 280-281)

Southwestern, acting as agent for Garmoja, received the assignment letter signed by Anlyan and took it to the petitioner Bank to have Anlyan's signature verified. The Bank confirmed the authenticity of Anlyan's signature, and it may be inferred from the verdict that the jury found there was either an express or implied promise by the Bank to credit the dollars to Southwestern's account when the remittance referred to in Anlyan's letter was received from Italy.

Southwestern then advised its principal, Garmoja, that it might go ahead with the transaction with Corti. Garmoja deposited the lire in an Italian bank for Corti's account and Corti authorized the remittance

of $37,222 to Anlyan pursuant to the terms of the license Corti had received in connection with the wool rags transaction. No license was obtained from the Italian foreign exchange authorities for the diversion of these dollar funds to the purchase of fatty acids in accordance with the Garmoja-Corti deal. (R. 704, 707).

On October 16, 1951 the petitioner Bank received a cable in Italian from the Bank of Italy instructing it to pay Anlyan $37,222 "PERCONTO SICCA DANTE CORTI." While the petitioner Bank at that time did not know that the dollar remittance was part of an illegal exchange deal, the Bank's officer in charge of the matter, after comparing the Anlyan assignment letter with these payment instructions, decided that the money should be paid to Anlyan in strict accordance with the terms of the cable remittance from Italy. Accordingly he directed that the proceeds check be delivered to Anlyan. This was done and Anlyan was told that because of the manner in which the funds had been remitted the Bank could not follow his instructions but that he could deliver the check to Southwestern if the funds belonged to it. (R. 1048, 1051-1052).

At this point the dollar remittance had been carried out as authorized by the Italian exchange authorities and petitioner Bank had paid out $37,222 to Anlyan in strict accordance with the cable remittance. The illegal aspect of the Garmoja-Corti deal was not carried out because Corti's agent, Anlyan, did not divert the dollars to Garmoja's agent, Southwestern. Southwestern then sued to recover from the Bank an additional $37,222 because Anlyan had failed to turn over

to it the original $37,222 pursuant to the illegal exchange contract.

The complaint alleged nine causes of action sounding in money had and received, contract and tort. The money had and received causes of action were dismissed at the trial and no appeal was taken by respondent from these dismissals. The contract causes of action alleged in substance that the Bank promised Southwestern it would comply with the terms of the Anlyan assignment letter and that it failed to do so. The tort cause of action alleged in substance that the Bank carelessly, negligently, etc., failed to pay $37,222 to plaintiff pursuant to the terms of the Anlyan assignment letter.

Petitioner's pleading consisted of general denials together with an affirmative defense which alleged that each of plaintiff's causes of action "arose out of or is based upon" a foreign exchange transaction in which respondent was acting solely as agent for Garmoja; that the exchange transaction was in violation of the foreign exchange laws of Italy and was, therefore, illegal and void under the laws of Italy; and that the transaction was

> "contrary to the public policy of the United States of America and the State of New York and unenforceable in the Courts of either." (R. 77)

The trial judge submitted to the jury the causes of action sounding in contract and tort but he instructed the jury not to concern itself with the affirmative defense of illegality. The jury returned a 10-2 verdict

in favor of the plaintiff on both the breach of contract and the negligence causes of action. The trial judge, Mr. Justice Frederick Backer, then later set aside the verdict and directed the entry of judgment for the petitioner on the basis of its affirmative defense of illegality. He ruled that

1. The entire Garmoja-Corti-Anlyan-Southwestern transaction was in violation of the Italian foreign exchange control laws and therefore illegal, void and unenforceable under the laws of Italy (R. 1609);

2. The public policy of the State of New York precluded the courts from lending any aid to the enforcement of this illegal transaction (R. 1630-1631); and

3. Since the Italian foreign exchange regulations complied with the requirements of the Bretton Woods Agreement (60 Stat. 1401) that Agreement precluded the state courts from aiding in the consummation of this illegal exchange contract. The language from the opinion of the Supreme Court, New York County on this latter point is as follows:

> "With these established facts in mind, our courts, under the Bretton Woods Agreement, are expressly prohibited from furnishing any assistance to the enforcement of any agreements made in violation of the Foreign Exchange Control Laws of Italy [citing Art. VIII § 2(b)]" (Fols. 1618-1619)

Respondent appealed from the judgment dismissing the complaint to the Appellate Division, First Judicial Department. The Appellate Division affirmed the

judgment of the Supreme Court unanimously and without opinion.

Respondent then obtained leave to appeal to the Court of Appeals of the State of New York and, upon that appeal, the judgment in favor of petitioner was reversed and the verdict of the jury was reinstated, two judges dissenting. The substance of the majority opinion in the Court of Appeals is contained in the following quotations:

> "Assuming then, the illegality of the Garmoja-Corti agreement and the Anlyan assignment under Italian law, and hence under Article VIII, section 2, subdivision b, of the Bretton Woods International Monetary Agreement, and assuming further that plaintiff was the alter ego of Garmoja, the defendant, as a mere depository or transmittal agent of the proceeds of the arrangement, had no status to assert the illegality of those transactions.
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> * * * *
>
> "Thereupon, as found by the jury, defendant promised to pay the money to plaintiff in accordance with the assignment, but by reason of its own negligence, and in breach of its agreement, paid to the wrong party. The law seems clear that defendant may not escape from its contractual liability, or the consequences of its own negligence, by asserting the illegality of the antecedent agreement by reason of which it received the proceeds.
>
> * * * *
>
> "Plaintiff here is seeking to enforce a *lawful* promise of payment by a party unconnected with

the antecedent illegal exchange agreement. This promise was made in New York, to be performed in New York, and its enforceability is governed by New York law. The same is true of defendant's negligence, which tort was committed in New York."

"The Bretton Woods Agreement adds nothing to the already settled law of this State that a party to an *illegal agreement* cannot enforce it *against the other* party. . . . In our opinion it in no way affects the common law rule of this State that a depositary of the proceeds of an illegal transaction cannot plead the illegality of the transaction as a bar to suit against it for breach of contract and negligence." (Emphasis by the Court.)

The dissenting opinion in the Court of Appeals does not deal with the federal question but merely argues that the defense of illegality was properly interposed under the New York law. For present purposes the significance of the dissenting opinion is that it points up the fact that, as a result of the decision of the Court of Appeals, the illegal Garmoja-Corti-Anlyan-Southwestern transaction will be consummated through the assistance of the courts of the State of New York. Judge Desmond wrote:

"I would affirm. We are agreed, I suppose, that the Garmoja - Corti - Anlyan - Southwestern transaction was illegal. It has been settled in this State for more than a century, . . . that the courts will under no circumstances lend their aid to the enforcement of an illegal deal. . . . An exception to or nonapplicability of this rule has

been declared in decisions like *Murray* v. *Vanderbilt* (39 Barb. 140), *Merritt* v. *Millard* (4 Heyes 208) and *Leonard* v. *Poole* (114 N. Y. 371), 378, 379) where the illegal transaction had been fully completed but one who was a mere repository for one of the parties then refused to turn over the money or property. The present is not such a case since judgment for the plaintiff here would in effect compel the taking of the final step in the transaction itself—a step without which the transaction would be meaningless—that is, the assignment to plaintiff. . . .

"Although the point is not made in these terms by defendant, it would seem that this defendant, had it learned the purpose for which this assignment was made, could have refused to recognize that document and could have stood on its right not to aid in carrying out an essentially illegal transaction. That being so, its position is not made worse by the fact that by error or negligence it paid out the money to the assignor instead of holding it for the assignee and thus rounding out the whole forbidden transaction."

Reasons for Allowance of the Writ

The Bretton Woods International Monetary Agreement (60 Stat. 1401) was signed by 35 nations including the United States to provide, among other things, for international cooperation on monetary controls. There are now 68 nations which have accepted the Agreement. The member nations commit themselves to certain limitations in the enactment of exchange control regulations. (Article VIII, Section 2(a).) It

is also required under a heading entitled "GENERAL OBLIGATIONS OF MEMBERS" that exchange contracts involving the currency of any member nation which violate that nation's exchange control regulations maintained consistently with the Agreement

> "shall be unenforceable in the territories of any member." Article VIII, Section 2(b), first sentence.

In addition to the international Agreement itself, Congress has passed a statute specifically assuming this obligation on behalf of the United States. Title 22 U. S. C., Section 286 h provides in part:

> "The provisions of the first sentence of Article VIII, section 2(b) of the Articles of Agreement of the Fund . . . shall have full force and effect in the United States . . ."

The Congressional reports make it clear that this Bretton Woods International Monetary Agreement was regarded by Congress as containing provisions vital to the financial stability of the international community and therefore important to the foreign and domestic commerce of the United States.

> *Senate Report No. 452*, 79th Cong. 1st Sess. (1945);
> *House Report No. 629*, 79th Cong. 1st Sess. (1945).

The substance of the Garmoja-Corti exchange deal was that Garmoja would pay lire to Corti in Italy in exchange for dollars to be made available to its agent Southwestern in New York. The purpose of the ar-

rangement was to circumvent the exchange control regulations of Italy. Italy is a member nation of the Bretton Woods Agreement and the Italian regulations in question were proven to be in compliance with the provisions of the Bretton Woods Agreement. (R. 1548-1554)

Respondent's suit was brought because the final step in the illegal Garmoja-Corti exchange transaction —the placing of dollars in the hands of Garmoja's agent Southwestern in New York—was not consummated. If the suit succeeded the illegal exchange transaction would be fully consummated. If it failed the Garmoja-Corti deal would be frustrated. While Corti had received its lire in Italy, Garmoja would not have had any dollars made available to it in New York.

The Trial Court dismissed the complaint, notwithstanding the verdict, on the alternative grounds that the public policy of New York precluded the consummation of the illegal exchange contract by a judgment for Garmoja's agent, Southwestern; and that the Bretton Woods Agreement also precluded such a recovery.

> "With these established facts in mind, our courts, under the Bretton Woods Agreement, are expressly prohibited from furnishing any assistance to the enforcement of any agreements made in violation of the Foreign Exchange Control Laws of Italy." (R. 540)

The New York Court of Appeals, however, has refused to permit petitioner to assert the federal Agree-

ment as a defense to the action because of its status in the transaction:

> "Assuming, then, the illegality of the Garmoja-Corti agreement and the Anlyan assignment under Italian law, and hence under Article VIII, Section 2, subdivision b, of the Bretton Woods International Monetary Agreement, and assuming further that plaintiff was the alter ego of Garmoja, the defendant, as a mere depository or transmittal agent of the proceeds of the arrangement, had no status to assert the illegality of those transactions."

If the applicability of an international agreement is permitted to depend upon such matters of state practice, the result will be that the federal policy will be enforced in some states but not in others. The necessity of a uniform application of an international agreement within the United States precludes this result.

Other portions of its opinion indicate that the Court of Appeals regarded the Agreement provision as applying only to suits by one party to an illegal exchange contract against the other party.

> "Plaintiff here is seeking to enforce a *lawful* promise of payment by a party unconnected with the antecedent illegal exchange agreement."
>
> * * * *
>
> "The Bretton Woods Agreement adds nothing to the already settled law of this State that a party to an *illegal agreement* cannot enforce *it against the other party.*" (Emphasis by the Court.)

Commentators on Article VIII, Section 2(b) have agreed, however, that the unenforceability provision should not be limited in its application to suits between the parties to the illegal exchange contract.

Meyer, *"Recognition of Exchange Controls After the International Monetary Fund Agreement."*, 62 Yale Law Journal 887, 894-895, 908 (1953).

Gold, *"Article VIII, Section 2(b) of the Fund Agreement and the Unenforceability of Certain Exchange Contracts: A Note"*, International Monetary Fund Staff Papers, Volume IV, No. 2, February 1955.

Schnitzer, *"The Legal Interpretation of Article VIII, Section 2(b) of the Bretton Woods Agreement"*, International Law Association, Report of the 47th Conference, Dubrovnik (1956) p. 302.

The petitioner has pleaded and proved that respondent's suit will, if successful, consummate an illegal exchange contract in violation of the Italian exchange regulations. The United States has covenanted with Italy that such an exchange contract will be "unenforceable" within the United States. But the State of New York through its highest appellate court has frustrated this international commitment of the United States by ruling that its common law and public policy do not permit the assertion by petitioner of this defense based on the federal Agreement.

Prior decisions of this Court, however, have made it abundantly clear that state policy and law must

yield when they are in conflict with the policy of the United States as expressed in an international agreement:

In *United States* v. *Belmont*, 301 U. S. 324 (1936) this Court said at pages 331-332:

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. 'To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.' 3 Elliot's Debates, 515. And see *Ware* v. *Hylton*, 3 Dall. 199, 236-237. And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. Compare *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 316, *et seq.* In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And

> when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. . . . ."

And in *United States* v. *Pink*, 315 U. S. 203 (1941) this Court said at pages 230-231:

> "But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. See *Nielsen* v. *Johnson*, 279 U. S. 47. Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum (*Griffin* v. *McCoach*, 313 U. S. 498, 506) must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. *Santovincenzo* v. *Egan*, *supra*, 284 U. S. 30; *United States* v. *Belmont*, *supra*."

We respectfully submit that the State of New York may not preclude a defense to an action on the basis of its own law or public policy where the result will be to defeat the policy of the United States and to nullify its international commitments.

This is essentially the same type of federal question as was presented in *United States* v. *Pink*, *supra*. In that case the New York courts dismissed a complaint on the ground, inter alia, that the claim (which was based upon an international agreement) was repugnant to the public policy of the State of New York. This Court granted a writ of certiorari and held that the public policy of the State had to give way to the federal policy as expressed in the inter-

national agreement. We respectfully submit that this same rule should apply here where the policy of the United States has been asserted as a defense to an action rather than as a ground for affirmative relief.

There is a second reason why the decision of the New York Court of Appeals is of sufficient importance to warrant review by this Court. The instant case appears to be the first one in the United States in which the construction of the first sentence of Article VIII, Section 2(b) of the Bretton Woods International Monetary Agreement is determinative of the action. In the following decisions foreign courts have construed the first sentence of Article VIII, Section 2(b) as precluding enforcement of an exchange contract:

White v. *Roberts*, 33 Hong Kong Law Reports pp. 231-282 (Hong Kong Supreme Court, 1949);

Lessinger v. *Mirau* (unreported; decided by the Oberlandesgericht for Schleswig-Holstein, Germany, April 1, 1954; discussed by Dr. Hartwig Bülck in *Jahrbuch für Internationales Recht*, Vol. 5, Part I (1955), pp. 113-23);

Societe Filature v. *Epoux Heynen-Bintner*, Pasicrisie Luxembourgeoise (1957) pp. 36-39 (Tribunal d'Arrondissement de Luxembourg, Feb. 1, 1956).

Each of these cases held that the domestic public policy also precluded the enforcement of the illegal exchange contract. In the instant case the public policy of New York as pronounced by the Court of Appeals would not preclude a recovery by South-

western. But, if the interpretation given to the first sentence of Article VIII, Section 2(b) by the Trial Court was correct, the Bretton Woods International Monetary Agreement requires a dismissal of the complaint irrespective of the law or public policy of the State of New York.

Article VIII, Section 2(b) is now part of the domestic law of the 68 nations which are signatories to the Agreement. Since New York is the principal money center of the world the decision by the New York Court of Appeals in this case may be expected to influence the decisions by other courts in the United States and throughout much of the non-communist world in cases where the "unenforceability" provision of the Bretton Woods Agreement is raised.

The Court of Appeals has placed a very narrow construction upon the term "exchange contracts" which the Agreement provides shall be "unenforceable". Its opinion states that the suit represents a claim based upon "a lawful promise of payment" and "negligence" "unconnected with the antecedent illegal exchange agreement". It is beyond dispute, however, that the "promise of payment" was petitioner Bank's alleged promise that it would comply with the instructions in the Anlyan assignment letter. Similarly, the "negligence" pleaded by respondent Southwestern was that petitioner Bank allegedly carelessly, negligently, etc., failed to comply with the terms of the Anlyan assignment letter. But that letter, delivered in Italy, provided for a vital and essential step in the attempted circumvention of the Italian exchange regulations.

Under these circumstances the only reasonable construction of the phrase "exchange contract" would include the dollar assignment phase of the transaction which was to be performed in New York and would preclude its enforceability. The dissenting opinion in the Court of Appeals notes that

> ". . . judgment for the plaintiff here would in effect compel the taking of the final step in the transaction itself—a step without which the transaction would be meaningless—that is, the assignment to plaintiff."

We respectfully submit that the phrase "exchange contract" as used in the Agreement should be construed to include each step essential to the accomplishment of the illegal objective. Any other construction of the international Agreement would severely hamper the accomplishment of the objective of the member nations.

Both the Hong Kong Supreme Court in *White* v. *Roberts*, *supra*, and the German Oberlandesgericht in *Lessinger* v. *Miran*, *supra*, gave to Article VIII, Section 2(b) a broad construction in order to accomplish its obvious purpose of discouraging illegal exchange contracts. Each was a case by one of the parties to an illegal exchange contract to recover in quasi-contract from the other party money paid pursuant to the illegal contract. Recovery was denied in each case on the ground that the provision of the Agreement rendering "exchange contracts . . . unenforceable" was broad enough to preclude a recovery in quasi-contract of money paid pursuant to the illegal agreement.

The very narrow construction given by the Court of Appeals to the phrase "exchange contracts" in the

instant case cannot be reconciled with the construction of this same provision of the Agreement by courts of foreign countries. It would impair and nullify the obligation of the United States contained in the Bretton Woods International Monetary Agreement as it is likely to be presented in cases brought in this country.

This Court should review the decision below and reverse the decision of the New York Court of Appeals in order that the provision of the Agreement may receive a uniform interpretation by the courts of the various member nations and that the provision may receive an interpretation consistent with its obvious purpose of discouraging illegal exchange transactions.

Conclusion

We respectfully submit that this case presents substantial federal questions which have not previously been passed upon by this Court and which are of such importance as to warrant review by this Court with an opportunity for full briefing and oral argument.

Respectfully submitted,

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September 14, 1959

APPENDIX A

Opinion of Supreme Court, New York County

Reported at 11 Misc. 2d 397, 173 N. Y. S. 2d 509

Decided March 17, 1958

SOUTHWESTERN SHIPPING CORPORATION,
Plaintiff,

vs.

THE NATIONAL CITY BANK OF NEW YORK,
Defendant.

BACKER, *J.*:

This case was tried before the court and a jury. Plaintiff sued to recover the sum of $37,222 paid by the defendant to one Anlyan, on or about October 17, 1951, pursuant to cable instructions from the Bank of Italy at Milan, Italy, to the defendant. Plaintiff claims the money should have been paid to it, instead of to Anlyan. In substance, the background of the negotiations was as follows: In September of 1951, an Italian entity, known as Garmoja, entered into an arrangement in Italy with Sicca Danti Corti, another Italian entity (hereinafter called Corti), pursuant to which Garmoja paid 23,310,000 lire to Credito-Lombardo, an Italian bank, for the account of Corti, and Corti then instructed Credito-Lombardo to transmit $37,222 to said Anlyan, who, in advance of such transfer, was to assign said sum of $37,222 to plaintiff, and plaintiff, upon receipt of said amount, was to hold it for Garmoja. The evidence established that Anlyan

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did, in advance of such transfer, assign said $37,222 to plaintiff and that plaintiff in turn notified defendant of such assignment, and that defendant promised to pay such amount to plaintiff but that defendant nonetheless paid same to Anlyan.

Nine separate causes of action were pleaded by plaintiff, to which the answer of defendant presented triable issues. Defendant's answer raised the specific affirmative defense that the arrangement between Garmoja and Corti was an agreement for the purchase and sale of dollar exchange, and as such was a violation of the Foreign Exchange Control Laws of Italy; and further, that such agreement and the attempted transfer of such funds, pursuant to such agreement, by Anlyan to plaintiff are contrary to the public policy of the United States and the State of New York and as such unenforceable by our courts.

The factual issues were duly tried and the jury rendered its verdict in favor of the plaintiff. At the close of the entire case decision was reserved on defendant's motion to dismiss the complaint and for a directed verdict, as a matter of law. Decision also was reserved on plaintiff's motion to dismiss the affirmative defense. There now awaits my determination of the legal facet of the trial, viz., whether or not defendant's affirmative defense of the Italian law is a complete bar to plaintiff's recovery as a matter of law. Resolution of this legal issue is not an easy task, since the factual and legal problems posed are out of the ordinary and there is a dearth of case law similar in factual detail. However, the Court's study has been fortified by and has had the benefit of able

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research and presentment on the part of respective counsel for which the Court extends its commendation.

By section 344-a and b of the Civil Practice Act it is incumbent upon the Court to determine the law of Italy as it affects the facts in this case. The Court has taken judicial notice of the relevant, applicable laws of Italy. Under the law of Italy, as it existed from 1934 to date, no transactions in foreign exchange could or can be effected unless duly licensed by the Italian Government; licenses permitting a transaction in foreign exchanges other than those relating to the needs of Italian citizens for trips abroad, must be based upon either the export or import of goods from or to Italy; the amount of foreign exchange authorized for any particular transaction must be stated in the license authorizing the import or export of the goods involved; and these licenses may be used only in connection with the import or export of goods for which they were granted and only by the person to whom they were granted. These prohibitions are contained in the following laws of Italy:- (1) The Royal Decree Law of September 29, 1931, #1207; (2) The Ministerial Decree of May 26, 1934; (3) The Ministerial Decree of December 8, 1934; (4) The Royal Decree Law of May 12, 1938, #794; (5) The Royal Decree Law of December 5, 1938, #1928; (6) The Ministerial Decree of March 5, 1949.

Pursuant to the Royal Decree Law of May 12, 1938, #794, an Advisory Board was established which ruled, in an opinion dated June 6, 1939, Opinion #4158, that: "Payment of Lire in Italy, to correspond to a payment in foreign currency abroad, not made pursuant to license, is a violation of the provisions of

Article 1 of the Ministerial Decree of May 26, 1934 and of Article 9 of the Ministerial Decree of December 8, 1934." The same Advisory Board also rendered an opinion on July 31, 1939, Opinion #4266, which stated that: "Whoever accepts, in Italy, lire to correspond to a transfer of foreign exchange abroad violates Article 1 of the Ministerial Decree of May 26, 1934 and Article 9 of the Ministerial Decree of December 8, 1934."

Defendant's expert, Dr. Rava, gave learned and impressive testimony on these controlling Italian laws, decrees and Advisory Board opinions, as well as upon applicable and controlling decisional law of the courts. He testified that the transactions here involved constituted a violation of the Italian law, as also was the assignment to Anlyan, and that the entire transaction and attempted transfer was illegal, void and unenforceable in Italy. In support of his expert opinion, Dr. Rava cited and discussed the aforestated Italian Decree Laws, the two Advisory Board opinions and also the following cases: Societa' La Ferraglia v. American Commercial Company (Foro Italiano, 1951—No. 1, p. 536, decided by the Supreme Court of Italy, April 14, 1951); Societa' Thea Impex v. Unger (Foro Italiano, 1951, No. 1, p. 536, 40 Italiano Repertorio, p. 299 [Temi Genovese 1952, p. 199], decided by the Court of Genoa on December 15, 1951).

Studying the pertinent provisions of the aforementioned Decree Laws, we find they read as follows:

"*The Decree Law of May 26, 1934.*

1. Only operations in foreign currency or exchange pertinent to the real needs of industry or

commerce or covering the needs of the person travelling abroad may be executed.

Such needs must be evidenced by original documents. Operations covering needs of persons residing abroad whose assets are within the kingdom, its colonies or possessions may be executed.

2. When the operation is executed, the party furnishing the foreign currency must affix a stamp on the evidencing documents which indicates the amount of exchange transferred.

3. Banks, bankers, exchange brokers and in general, associations, companies and entities which have their own domestic or foreign accounts in foreign currency must notify the Banca d'Italia of the balances of said accounts.

Said notice must be given within fifteen days of the date of publication of this decree for the balances existing as of the date of the report, and successively, every ten days, by banks, bankers, exchange brokers, not later than five days after the end of the ten day period, and every month by associations, companies and entities, not later than ten days after the end of the month.

4. From the date of publication of this decree, banks, bankers, exchange brokers, associations, companies, entities and Italian citizens residing or domiciled in the kingdom, it (sic) colonies and possessions, are prohibited from purchasing valuables and securities in foreign markets, whether said purchases are made for their own account or for account of third parties, and

whether said valuables and securities are foreign or Italian ones issued abroad.

For those securities even if they are physically deposited abroad and were owned as indicated above prior to the date of publication of this decree, proof of such prior possession shall be evidenced by the stamp and on the receipt for payment of the stamp tax under the terms of the royal decree—law no. 804 of May 26, 1934.

* * * * *

6. The terms of this decree also apply to payments in lire to be made in favor of a foreign party, whether by a credit in account or a transfer.

* * * * *

14. Without prejudice to the greater penalties imposed by the common laws and by art. 3 of royal decree—law no. 1207 of September 29, 1931 persons violating the terms of this decree shall be subject to the fines which the Minister of Finance is authorized to impose up to an amount equivalent to the value of the securities and foreign currency involved in the violation.

In the case of associations and companies, the penalties shall be imposed even on the president, delegate director and auditors, as well as on the officers and employees who by their personal action made the operation possible or so handled it as to hinder the knowledge of its true nature.

Whether the transgressors are private individuals or companies, the above mentioned penalties shall be applicable to the principals, to those

directly interested in the operation, as well as the employees acting in the manner described in the previous paragraph.

All those persons who in any way took part in the operations not approved by this decree shall be likewise subject to the penalties set forth in this article.

The Minister of Finance shall use all the means at his disposal to conduct the necessary studies and investigations to assure the exact application of the terms of this decree which shall become effective on the date of its publication in the Official Gazette of the kingdom."

The Decree Law of December 8, 1934.

"9. Only the Exchange Office may trade the means used for payments outside Italy.

The purchase of foreign exchange, foreign drafts, bank notes and treasury notes, the utilization of any other means of payment outside Italy, the realization of foreign securities abroad, and Italian securities issued abroad, and the collection of their relative coupons are effected exclusively by the same office.

The exporting of foreign securities or Italian securities issued abroad may not be effected without a permit from the Exchange Office."

The Decree Law of May 12, 1938:

"1. The Instituto nazionale per i cambi con l'estero (National Foreign Exchange Office) has the control and supervision over the due observ-

ane of prevailing regulations in matters of exchange with foreign countries, payments and collections outside the kingdom, exchange trade, the compulsory transfer and reporting of credits abroad, and of Italian securities issued abroad, transfer to foreigners of organizations or participation in foreign enterprises, control of the gold trade and monopoly of purchases abroad of gold, and other matters covered in the second and third paragraphs of article 2 of decree no. 643 of March 14, 1938.

6. "Under the ministry for foreign exchange and currency, a consultative commission is established for the purpose of expressing its opinion on the infractions detailed in article 2 of decree no. 643 of March 14, 1938, and article 1 of the present decree.

The commission consists of a president and four members, appointed every two years by decree of the minister for foreign exchange and currency, who also appoints a secretary for the commission for the same term of office.

The secretary is assisted by the personnel on the payrolls of the ministry for foreign exchange and currency and of the Instituto nazionale per i cambi coi l'estero.

A majority of its members must be present for the commission to legally hold a meeting and decisions are reached by a majority vote. In case of tie, the president has the deciding vote."

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The Decree Law of December 5, 1938.

"2. Without prejudice to the penalties established by other legislative rules, the minister of exchange and foreign currency is authorized to impose on transgressors, by his own decree, fines for a sum not exceeding five times the value of the foreign exchange, securities, merchandise, etc. involved in the violation.

The same fine may be levied on whoever performs qualified acts unequivocally intended for the purpose of violating one of the terms of the preceeding article, and on any person assisting in the commission of one of said violations, or hindering investigation thereof."

The Decree Law of March 5, 1949.

"1. Private compensation transactions are authorized with permits issued by the Italian Exchange Office, on the instructions of the Minister of Foreign Trade."

In the La Feraglia v. American Commercial Company, supra, the facts were as follows:

Two Italian firms entered into an agreement in Italy for the purchase and sale of merchandise located in France. Payment was to be made in "free" U. S. dollars which the purchaser of the goods had on deposit with a Swiss bank. That dollar credit was lawfully owned by the purchaser as a result of a previous legal export transaction. Presumably the terms of the agreement were not carried out, and the seller sued to recover the purchase price. The buyer raised the

question of the illegality of the transaction and that defense was sustained by the Supreme Court and it should be noted that the defendant in that case made the very same argument that the plaintiff is making in this case. In so holding, the Supreme Court of Italy said:

> "Ferraglia's first ground of appeal consists of two parts. * * *.
>
> * * * *
>
> In the second part it is stated that the agreement to pay 'free' dollars is not void because the law does not forbid the trade in foreign currency between Italian firms, in Italy.
>
> And this is so true that the Decree of the Regent, March 26, 1946, No. 139, allows the exportation of merchandise from Italy, provided that half of the so obtained foreign currency will be transferred to the State.
>
> Moreover, Article 1278 of the Italian Civil Code provides that whoever is the debtor of a sum of money of a currency which is not the official currency of the State is allowed to satisfy his obligation with the then official currency of the State. * * *
>
> * * * *
>
> With regard to the assumed validity of the agreement to pay with 'Free dollars on a Swiss Bank' on the basis of Article 1278 of the Civil Code and of the Decree of March 26, 1946, No. 139, it will be sufficient to point out, without even taking into consideration the difference existing between 'Export Dollars' and 'Free Dollars', and the fact that the law allows the Italian importer

to dispose of only one-half of the currency which he has received in payment, that the Decree, as well as Article 1278, does not consider an hypothesis like this one.

In this case a payment has to be effected abroad with foreign currency, of which the buyer should have had free power of disposal. * * *

* * * *

Ferraglia assumes, with his third ground for appeal, that the payment of 'Free' dollars could not have resulted in the voidness of the contract in the first place, because violations in the field of foreign currency are punished only with pecuniary fees which are imposed by the Minister of the Treasury who thereby exercises an administrative power, and secondly, because, even assuming that this particular clause of the contract will be considered void, it does not follow that the whole contract is void.

But such arguments are not well taken.

It will be clear from the reasoning this Court followed while examining the first ground of appeal, that the payment of Ferraglia of 'Free' dollars on a Swiss Bank is infringing imperative rules which cannot be derogated by private transactions.

Therefore, it is now almost useless to recall, it being quite obvious, that a contract which infringes imperative legal provisions is void (Article 1418 Civil Code).

The plaintiff (Ferraglia) quotes the decision of this Court of July 16, 1946, No. 892 (Foro Itali-

ano 1947, 1-376) according to which: if a legal provision sets forth only pecuniary and disciplinary sanctions for its violation, the further and more severe sanction of the voidness of the contract, or of one of its infringing clauses, should be deemed to be implicitly excluded.

The quotation is correct but, should the principle, which in that case the Court sets forth, be considered as having a general meaning so as to be applied to all cases, it could not be accepted (in fact it was a very particular case so that not even the 'massima' was written).

When there is an imperative legal provision and a legal transaction violates it, the *poena adicta* (additional sanctions) of a fee or a disciplinary measure does not exclude the voidness of the contract.

Article 1418 of the Civil Code, First Paragraph, sets forth a rule ('The contract which infringes imperative legal provisions is void'), and an exception thereof ('except in the case when law otherwise provides').

This means that, if the legal provision does not provide otherwise, the contract violating imperative legal provisions is void even if such voidness is not explicitly provided for (see: Report of the Minister of Justice No. 649).

It follows that the existence of a pecuniary or disciplinary sanction which can be provided for as sole sanction, but also only in order to add in strength to the command of the law which imposes or forbids, has no bearing.

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It is always necessary to ascertain whether or not the contract infringes an imperative legal provision, and the voidness of the contract is an inescapable consequence thereof if the violation exists.

Not even the other thesis, according to which, on the basis of the second paragraph of Article 1419 Civil Code, and of previous decisions of this Court (August 26, 1946 No. 1266 in Foro Italiano 1947, 1-194) only the clause referring to the payment, and not the whole contract, would be void, can be accepted.

In the first place, the hypothesis taken into consideration by the second paragraph of Article 1419; i.e. the validity of the contract notwithstanding the voidness of some of its clauses which are automatically replaced by imperative legal provisions, is not the one of this case.

The imperative legal provisions which should automatically take the place of the void clauses does not, in fact, exist.

The first paragraph of Article 1419 Civil Code, on the contrary, very clearly frames an hypothesis such as the one of the present case.

As the lower Judge has established, the clause by which a payment of 'free' dollars had to be made on a Swiss Bank, was an essential clause of the contract: It was necessary, in fact, to American Co. that the payment was performed in such a way in order to be able to pay the Belgian corporation which owned the merchandise and was the real seller.

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Ferraglia had agreed on this clause.

Finally, the decision of August 26, 1946 No. 1266, is not relevant to this case.

It was held that the legal provisions which limit the freedom of commerce in foreign currency do not provide the voidness of the obligation to pay such currencies within the country (Italy), but only affect the way in which the payment has to be made, providing that such payment is performed in lire at the exchange rate of the day on which the money becomes due.

In this case the payment was to be made not within the country, but abroad, disregarding the clearing agreement and the legal provisions dealing with foreign currency.

Therefore, the whole agreement based on such payment is radically void. (omissis) * * *

* * * * *

Therefore, the appeal is rejected." * * *

In the case of Societa' Thea Impex v. Unger, supra, the facts appeared as follows:

A, a citizen of Italy, entered into an agreement with B, a citizen of Czechoslovakia, for the purchase by A of merchandise from B. The agreement provided that payment for the goods was to be made in U. S. dollars by C, a resident of New York. A in turn agreed to reimburse C by crediting his account in Italy with a sum of lira equivalent to the amount of dollars paid by C to B.

In holding that such transaction was in violation

of the Foreign Exchange Laws of Italy and as such absolutely void and unenforceable, the Genoa Court said:

> "As a result of government monopoly on foreign exchange existing in Italy, payments abroad cannot be made directly by private individuals or firms but must be made in accordance with an authorization of the Italian Exchange Office which provides for the opening of a credit with a foreign bank. These rules of law are imperative and a contract made in violation of them absolutely void * * *. Since it clearly appears that payment was to be made with dollars which were to be obtained as a result of a violation of the rules governing trade in foreign exchange, imperative rules to which private agreements cannot make any exception, the contract under consideration was absolutely void."

With these pertinent authorities established, I find the testimony of Dr. Pavia, plaintiff's expert on Italian law, quite illuminating and instructive, but not in any wise contravening nor negating the law and decrees as proved by defendant. Dr. Pavia, while not disputing the stated authorities, said he had found an older case—Inaz v. Giachetti, decided by the Supreme Court of Italy on July 16, 1946, wherein it was held that a contract made in violation of a Mussolini decree limiting the amount of compensation payable to film actors was, nevertheless, "binding", and that he was "inclined to stick to the general principle expressed by the decision of 1946"

(T.M.,* p. 602). When confronted on cross examination with the fact that the Supreme Court in the American Commercial Company case had expressly overruled, or, at least, had limited the 1946 case to the particular facts involved therein, Dr. Pavia merely responded that "* * * I really cannot pay much attention to this observation by the Court * * *." Moreover, he admitted that an assignment such as the one made herein to plaintiff would be illegal under Italian Law. His testimony on this score bears repetition, as follows:

> "Q. Assume that Mr. Anlyan at Milan, Italy, in September of 1951, executed a letter to the National City Bank of New York in which he told the National City Bank of New York that he expected to receive from Italy $37,222 from an Italian bank, and that he wanted the National City Bank of New York upon receipt of those funds to pay them, not to him but to Southwestern Shipping Corporation. Now, further assume that Mr. Anlyan, while in Italy, takes that letter and hands it to an Italian citizen. Now I ask you: Does that violate the foreign exchange regulations of Italy? A. Not in itself.
>
> Q. I ask you to please refer to—
>
> The Court: I would like to ask you this question: But these funds do not belong to Mr. Anlyan. Does that change your answer: that he is assigning, but they are in fact the funds of an Italian citizen?
>
> The Witness: Then we have to go into the

* Note—"T.M." indicates "Trial Minutes"

background of the transaction, which I do not know.

Q. Let me ask you to please take into consideration in your answer the ministerial decree of December 8, 1934, Paragraph 9, which says: 'The power to transfer every credit which may be used to effect payments abroad is reserved to the National Office for Foreign Exchange.' Have you taken that into consideration in your answer? A. Yes, sir.

Q. Now, if Mr. Anlyan executes a transfer or an attempted transfer of funds, of foreign exchange funds, in Italy and delivers that in Italy, doesn't that contravene the ministerial decree of December 8, 1934? A. Let's see. Anlyan is a gentleman who—

Q. He is in Italy. A. Let me see—who happens to be in Italy, a resident of New York or a resident of the United States, who knows—well, we have to go into the background—who know (sic) that he is going to receive a certain sum of money.

Q. He hopes to receive it. A. He hopes to receive a certain amount of money from an Italian bank in dollars, and he writes a letter whereby he assigns that money to another American resident?

Q. No, to an Italian citizen and resident.*

* The so-called assignment, it will be recalled, instructed defendant to pay the moneys in question to plaintiff but as plaintiff was acting merely as agent for Garmoja the transfer of the funds in question was in fact and in law made to Garmoja. Note also that the hypothetical question put by defendant's counsel to Dr Pavia assumed, which is in accordance with the undisputed facts, that the assignment was delivered in Italy to Garmoja

A. That he couldn't do. He couldn't assign it to an Italian resident.

Q. That would be illegal, would it not? A. Then he would be selling American dollars in Italy.

Q. That is right; that is my point."

Pertinent to the foregoing and further emphasizing the illegality of the transaction is the fact that plaintiff admitted the transaction in question was nothing more than a purchase of exchange (T.M., pp. 181-2), pursuant to which Garmoja brought (sic) United States dollars from Corti and that the purchase of exchange is prohibited under the Foreign Exchange Control Laws of Italy (T.M., p. 175).

I am therefore convinced that the very form and essence of the transaction, including the fact that plaintiff was acting as agent for Garmoja in this transaction and that plaintiff was nothing more than an *alter ego* subsidiary for Garmoja (T.M., pp. 40-1), establishes that the entire transaction here involved was illegal, void and unenforceable in Italy.

Plaintiff's arguments seek to dissociate itself from the Garmoja-Corti agreement by asserting that it "does not predicate its right to recover on the Garmoja-Corti agreement, but rather on plaintiff's separate, distinct and entirely indepetident contract with the defendant, National City Bank." Plaintiff, however, has not explained the nature of that contract or how it came into existence. Plaintiff, instead, has cited the Restatement of Contracts, section 597; Williston on Contracts, Vol. 6, section 1752; Corbin on Contracts, Vol. 6, section 1531; and a number of cases

as authority for the following rule: "A bargain collaterally and remotely connected with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction." While neither defendant nor the Court finds fault with this statement of law, it nevertheless is without any potency or relevancy here. Plaintiff has not established any facts which bring it within the purview of this stated rule. Plaintiff merely makes the broad assumption that its claim is based upon a contract which is only collateral to and remotely connected with the illegal assignment and the illegal Garmoja-Corti agreement, and then cites the aforementioned authorities. However, the sum total of evidence, in my opinion, conclusively and unequivocally establishes that plaintiff's complaint and proof is predicated upon the assignment and the Garmoja-Corti agreement, both of which, as I have pointed out, are illegal by the laws of Italy. Studying the first cause of action, we find plaintiff alleges: "(3) That on or about the 16th and 17th day of October, 1951, at the City of New York, the defendant received the sum of $37,222 to the use of plaintiff, which said sum defendant promised to pay to plaintiff." There is no evidence that defendant, on the 16th or 17th aforestated, or at any time, received any sum of money to the use of plaintiff. The only evidence which could possibly relate to this allegation is that on or about October 16, 1951, defendant received cable instructions from the Bank of Italy to pay $37,222 to Anlyan. It follows, therefore, that unless the first alleged cause of action is based upon

the so called assignment by Anlyan to plaintiff, it must fail for lack of proof.

In each of the remaining causes of action plaintiff alleges, in substance, that pursuant to an agreement entered into by and between residents of Italy, Anlyan assigned the moneys in question to plaintiff; that plaintiff presented said assignment to defendant; and that defendant promised plaintiff that upon receipt of a direction and order to pay said $37,222 to Anlyan it would pay same to plaintiff. Plaintiff, therefore, to prove its causes of action, was required to, and did, introduce into evidence the assignment from Anlyan to plaintiff (Plff.'s Exh. 2). It also introduced into evidence a receipt from Credito-Lombardo evidencing payment of 23,310,000 lire by Garmoja to Credito-Lombardo from the account of Corti (Plff.'s Exh. 14) and evidence that said payment was made pursuant to the Garmoja-Corti agreement (T. M., pp. 297-315).

In view of all this there is no question but that plaintiff's claim is based upon the aforesaid illegal transactions, and not upon any separate, independent contract. Without proof of the assignment, plaintiff could have nothing upon which to predicate an alleged promise on the part of defendant to pay the money in question to plaintiff; and without proof of the payment of the 23,310,000 lire to Credito-Lombardo for the account of Corti plaintiff would be unable to prove any damage on the part of its principal, Garmoja. Without this assignment, plaintiff could not establish a prima facie case. Since the assignment itself is predicated upon an illegal and void agreement, the assignment attained no greater rights.

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Plaintiff's own proof showed that payment was made by Garmoja to Credito-Lombardo for the account of Corti of 23,310,000 lire and such payment was made pursuant to the illegal Garmoja-Corti agreement.

Testimony of Mr. Fanelli (vice-president of plaintiff) established he knew of the Garmoja-Corti agreement soon after it was consummated. He also admitted that plaintiff was acting as agent for Garmoja in this transaction and that in any event, the $37,222 was not plaintiff's money but was Garmoja's (T. M., pp. 66-7). Mr. Garavaglia also testified that the money was Garmoja's; that when the 23,310,000 lire was paid to Credito-Lombardo, Garmoja expected to receive in exchange for it $37,222 from New York by way of plaintiff receiving the money here in New York and holding same for Garmoja. Mr. Garavaglia is an Italian citizen and president-treasurer of the plaintiff corporation. He is also its sole stockholder since 1953. In September of 1951, the stockholders of plaintiff corporation were Garavaglia, Fanelli and Mojana, each owning one-third of the capital stock.

With these established facts in mind, our courts, under the Bretton Woods Agreement, are expressly prohibited from furnishing any assistance to the enforcement of any agreements made in violation of the Foreign Exchange Control Laws of Italy. Article VIII, section 2(b) of the Bretton Woods Agreement provides as follows:

> "2(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this

Agreement shall be unenforceable in the territories of any member."

The Board of Directors of the International Monetary Fund on August 18, 1949, issued an interpretation of the above quoted Article VIII section 2(b) of the Bretton Woods Agreement which provides in material part as follows:

"The meaning and effect of this provision are as follows:

1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example, by decreeing performance of the contracts or by awarding damages for their non-performance.

2. By accepting the Fund Agreement, members have undertaken to make the principle mentioned above effectively part of their national law. This applies to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, section 2.

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An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance."

And the Board of Directors of the Fund have by letter dated August 8, 1957, addressed to the Secretary of the Treasury of the United States (Defendant's Ex. V in evidence) determined that the six Italian Decree laws upon which Dr. Rava based his opinion (T. M. 319) have since Italy joined the Fund on March 27, 1947, and particularly during the year 1951, been maintained and imposed consistently with the Bretton Woods Agreement.

Both the United States and Italy are parties to the Articles of Agreement of the International Monetary Fund (Bretton Woods Agreement), effective December 27, 1945. This agreement was accepted by the United States on December 20, 1945, and by Italy on March 27, 1947.

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"Even in the absence of the Bretton Woods Agreement, I must conclude that the cited authorities are determinative of the legal issue presented and that plaintiff cannot recover, as a matter of law, in a case such as this, if, as part of its case, plaintiff is required to allege and prove an unlawful act. The rule is succinctly stated in *Stone* v. *Freeman*, 298 N. Y. 268, where the Court of Appeals said:

> "It is settled law of this State (and probably every other State) that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object, nor can such a person plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose (Reiner v. North Amer. Newspaper Alliance, 259 N. Y. 250; Municipal Metallic Bed Mfg. Corp. v. Dobbs, 253 N. Y. 313, 316; Morgan Munitions Corp. v. Studebaker Corp., 226 N. Y. 94; Flegenheimer v. Brogan, 284 N. Y. 268; Carmine v. Murphy, 285 N. Y. 413; Furman v. Furman, 287 N. Y. 772; Baksi v. Wallman, 297 N. Y. 456). * * * Both Staples v. Gould (supra) (9 N. Y. 520) and Leonard v. Poole (supra) (114 N. Y. 371), say that a broker or agent who knowingly participates in a criminal scheme is a principal, and in *pari delicto* with the one who employs him, so that neither may sue the other. Such is the New York law and it disposes of this case."

In Restatement of Contracts, section 597, and comment *b* thereunder, it is stated that:

> "A bargain collaterally and remotely connected

with an illegal purpose or act is not rendered illegal thereby if proof of the bargain can be made without relying upon the illegal transaction.

* * * *

"b. Even though a plaintiff's case can be made out without indicating anything unlawful, it may be shown that the bargain is illegal because of facts not brought out in the plaintiff's case, provided that the facts so offered show a close enough connection with an illegal transaction. The line of proximity varies somewhat according to the gravity of the evil apprehended: If the evil is serious a more remote connection with the illegal purpose or act is sufficient to invalidate the bargain than if the evil is slight."

To the same effect see: Williston on Contracts, vol. 6, section 1753; Corbin on Contracts, vol. 6, section 1531; and Wood v. Hill No. 2, 214 App. Div. 417 (First Dept., 1925).

In view of all the foregoing, I am of the ultimate conclusion that the Garmoja-Corti agreement and the assignment are contrary to the exchange laws and control regulations of Italy, and as such was illegal and void.

It is manifest, therefore, that the instant case falls squarely within the ambit of the stated rules, for plaintiff, as agent for Garmoja, is not only seeking the aid of this court to an objective which is illegal under the Italian Law, but plaintiff has also pleaded and proved as a basis for its claim the illegal Garmoja-Corti agreement; the payment of Garmoja thereunder,

and the illegal assignment by Anlyan to plaintiff. Cases in point are Gray v. Hook, 4 N. Y. 449; Goodrich v. Houghton, 134 N. Y. 115; Adler v. Zimmerman, 233 N. Y. 431. In DeWitt v. Brisbane (16 N. Y. 508), it was held that an assignment of a mortgage which was part of an illegal transaction was unenforceable because, by enforcing it, plaintiff would in effect be carrying out an illegal agreement. In holding the mortgage unenforceable, the Court said: "The familiar and well settled rule of law applicable to cases of this description is, that the court will not interfere to grant relief to either party. No court will lend its aid to a man who founds his action upon an illegal contract. * * *"

The cases relied upon by plaintiff are distinguishable and inapplicable here because, as hereinbefore pointed out, the facts established by the record here do not fall within the facts of the cases cited and, moreover, plaintiff's case is predicated upon the illegal contract and illegal assignment.

For all of the foregoing reasons and the applicable controlling law and decrees of Italy, it follows not only that defendant's affirmative defense is valid, but it is insurmountable. While the jury has spoken as to the factual issues, I am nevertheless constrained to set aside the jury's verdict and to grant defendant's motion for a directed verdict on its affirmative defense as a matter of law. Plaintiff's motion to dismiss the affirmative defense is denied.

The Clerk is directed to enter judgment accordingly in favor of the defendant against plaintiff.

Thirty days' stay of execution of judgment for costs and sixty days to make a case.

APPENDIX B

Memorandum of Affirmance of the Appellate Division of the Supreme Court, First Judicial Department

Reported at 6 App. Div. 2d 1036, 178 N. Y. S. 2d 1019
Decided October 21, 1958

By BREITEL, *J. P.*; RABIN, M. M. FRANK, VALENTE and STEVENS, *JJ.*

Judgment and order unanimously affirmed with costs, to the respondent. No opinion. Order filed.

APPENDIX C

Opinion of Court of Appeals of New York

Not as yet reported officially or unofficially
Decided July 8, 1959

SOUTHWESTERN SHIPPING CORPORATION,
Appellant,

v.

THE NATIONAL CITY BANK OF NEW YORK,
Respondent.

UNREVISED AND UNCORRECTED. NOT FOR PUBLICATION.

FROESSEL, *J.*:

Plaintiff, a New York corporation, was an export brokerage firm which acted as purchasing agent for

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several foreign importers, chiefly in Italy. In September 1951, one of plaintiff's principal Italian customers, a business entity named Garmoja, placed an order with it for 300 tons of fatty acid at a price of $37,222 American dollars. At this time the Italian foreign exchange regulations required that an importer have a permit license to pay dollars for the particular product it desired to purchase in the United States, but Garmoja had never obtained such a license. In order, therefore, to make dollars available to plaintiff in New York to enable it to purchase the fatty acids, Garmoja entered into a contract with Sicca Danti Corti (hereinafter called Corti), another Italian concern, which had obtained a permit license to pay dollars to an American named Aulyan for rags to be imported from the United States.

The contract provided that Garmoja would pay lire to an Italian bank, Credito Lombardo, for the account of Corti, and the Italian bank would transmit a credit for the dollar equivalent, $37,222, to defendant National City Bank of New York "in favor of" Aulyan. Aulyan, in advance of this transfer of credit, would execute an assignment of the dollars to plaintiff, which had an account with defendant at its 26 Broadway branch. Aulyan never had an account with defendant in his own name. The transaction, in substance, contemplated the purchase of American dollars in Italy and the transfer from Corti to Garmoja of the license granted to Corti to transmit dollars to the United States for a specific import.

To carry out this arrangement, Corti obtained from Aulyan a letter addressed to defendant, instructing

it to pay plaintiff the $37,222 it was to receive from Credito Lombardo for Anlyan's "account". The letter stated defendant should treat the instruction to pay plaintiff "as *irrevocable and without recourse* whatsoever from my part" (emphasis in original). Certi delivered this letter of assignment to Garmoja, which in turn forwarded it to plaintiff to have Anlyan's signature verified and to obtain assurance from defendant that it would pay the amount to plaintiff.

Plaintiff thereupon wrote a letter to defendant—"Confirming the call made by our representative at your Foreign Teller's Office"—with which it enclosed a copy of Anlyan's letter of assignment. Plaintiff's letter requested defendant to authenticate Anlyan's signature and transfer the money to its account. A memorandum was then dispatched by defendant to the "Signature Control Department" of its Canal Street branch stating that

> "It is extremely important to our customer, Southwestern Shipping Corporation *. * * that you inform us immediately if Mr. Armand Anlyan's signature on the attached letter is authentic."

By reply letter, defendant confirmed the authenticity of Anlyan's signature and, according to the uncontradicted testimony of one of plaintiff's officers, promised to credit plaintiff's account when the money arrived.

Plaintiff then advised Garmoja that defendant had authenticated the signature and

> "further notified us that it will credit our account

with the total amount of the remittance and, therefore, it is understood that we are indebted to you for the amount of $37,222.00."

Garmjoa paid 23,310,000 lire (the equivalent of $37,222) to Credito Lombardo for Corti's account, and the latter requested Banca d'Italia (the official bank of Italy which must pass upon all transfers of money) to transfer $37,222 by cable to defendant to be paid to Anlyan.

On October 16, 1951, defendant received a cable in Italian from the Bank of Italy instructing it to pay Anlyan $37,222. In translating the payment instructions in this cable, however, defendant's officials did not understand it to be the "credit" referred to in Anlyan's assignment to plaintiff. Accordingly, defendant, though admittedly aware that the cable presented a problem and that the funds referred to might be those to which the assignment related, nevertheless paid the money to Anlyan, and informed him that if these were the funds he had assigned to plaintiff, he could endorse the check and turn it over. Anlyan then absconded, and after defendant refused to pay plaintiff upon demand, plaintiff instituted this action to recover the sum.

The complaint alleged nine causes of action, sounding in money had and received, contract, and tort. The answer consisted of specific denials plus an affirmative defense alleging that each of the causes of action "arose out of or is based upon" a transaction which was illegal under the laws of Italy and hence

"contrary to the public policy of the United States

of America and the State of New York and unenforceable in the Courts of either."

In its charge, the trial court instructed the jury to completely disregard the affirmative defense, since it was "purely a matter of law", and to consider only whether defendant had expressly or impliedly contracted with plaintiff to pay it the $37,222, and whether defendant negligently paid to a third party money which was due plaintiff.

The jury returned a verdict for plaintiff "on the charge of breach of contract in the first instance and negligence on the part of the bank in the second". The trial court, in later setting aside the verdict on the basis of the affirmative defense, found: (1) that the agreement between Garmoja and Corti, as well as the Anlyan assignment, was illegal under Italian law, since the purchase, sale and transfer of foreign exchange was prohibited unless duly licensed by the Foreign Exchange Control Authorities of Italy; and (2) that plaintiff "was acting as agent for Garmoja in this transaction" and—by virtue of substantially common stock ownership and control—"was nothing more than an alter ego subsidiary for Garmoja". Accordingly, the court held that the suit was barred both by our common law and by Article VIII, section 2, subdivision b, of the Bretton Woods International Monetary Agreement (60 Stat. 1411, 22 U. S. C. A., § 286h). The Appellate Division unanimously affirmed, without opinion.

It is well settled in this State

"that a party to an illegal contract cannot ask a court of law to help him carry out his illegal

object, nor can such a person plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose." (*Stone* v. *Freeman*, 298 N. Y. 268, 271.)

To this well established principle of law, however, there is an equally well established exception. If a party to an illegal transaction turns over money or property to a third person for the use of the other party to the transaction, the latter can enforce the express or implied promise or trust of the third party to turn over the money or property, notwithstanding the fact that he could not have enforced payment or delivery by the party who voluntarily made the payment or deposit. A mere agent or depository of the proceeds of an illegal transaction will not be permitted to assert the defense of illegality in an action to recover the proceeds by a party to the illegal transaction (*Murray* v. *Vanderbilt*, 39 Barb. 140, 152-153; *Merritt* v. *Millard*, 4 Keyes 208, 213-214; *Woodworth* v. *Bennett*, 43 N. Y. 273, 276; *Leonard* v. *Poole*, 114 N. Y. 371, 379; *Shoary* v. *O'Brien*, 75 App. Div. 121, affd. 184 N. Y. 544; *Stone* v. *Freeman*, *supra*, 298 N. Y. 268, 271; Clark, New York Law of Contracts [1922], § 654; 6 Corbin on Contracts [1951], § 1531).

Assuming, then, the illegality of the Garmoja-Corti agreement and the Anlyan assignment under Italian law, and hence under Article VIII, section 2, subdivision b, of the Bretton Woods International Monetary Agreement, and assuming further that plaintiff was the alter ego of Garmoja, the defendant, as a mere depository or transmittal agent of the proceeds of the

arrangement, had no status to assert the illegality of those transactions.

The case of *Stone* v. *Freeman*, *supra*, relied upon by the trial court, is not authority to the contrary. There, a clothing jobber advanced money to a broker to be illegally used to bribe purchasing agents. Although we reversed a judgment *for the jobber against the broker* for the amount advanced, we were careful to note:

> "we are passing on the precise question here involved, and no other. *This is not a case where a mere agent or depository, receiving money for his principal, refuses to pay it over, on the ground that it was the fruit of an illegal contract between his principal and another* (see *Murray* v. *Vanderbilt*, 39 Barb. 140, 152; *Merritt* v. *Millard*, 4 Keyes 208; *Woodworth* v. *Bennett*, 43 N. Y. 273, 276; and the reference to such a situation by way of dictum, in *Leonard* v. *Poole*, *supra*, 114 N. Y. at p. 379)." (Emphasis supplied.)

In the instant case, defendant was merely a conduit through which dollars were to pass from one principal, Corti, to plaintiff, as alter ego of the other principal, Garmoja. It had no beneficial interest in or claim to the $37,222, and its position was that of a depository into whose hands moneys were delivered for payment to another (see *Sayer* v. *Wynkoop*, 248 N. Y. 54, 57-60). Had Corti, after receiving lire from Garmoja, refused to transfer the dollar equivalent as agreed, it could not have been compelled by law to do so. Corti, however, elected to waive any defense of illegality by

having the money transferred to defendant, and its agent, Anlyan, irrevocably assigned the sum to plaintiff.

Thereupon, as found by the jury, defendant promised to pay the money to plaintiff in accordance with the assignment, but by reason of its own negligence, and in breach of its agreement, paid to the wrong party. The law seems clear that defendant may not escape from its contractual liability, or the consequences of its own negligence, by asserting the illegality of the antecedent agreement by reason of which it received the proceeds.

Defendant seeks to distinguish the controlling New York cases on three grounds: (1) the agent in those cases refused to pay the proceeds of the illegal transaction to its *own* principal; (2) the illegal transaction was completed, and (3) to have sustained the defense would have left the agent with a windfall. None of these alleged distinctions will withstand analysis. In all the relevant cases, the third party, who received the proceeds from one principal to the illegal transaction, was obligated to the other principal by virtue of a contract or trust, express or implied, to pay over the proceeds. The triers of the facts here found that defendant, after verifying the authenticity of the assignment, promised to transfer the proceeds to the account of its own depositor, plaintiff. This clearly bound defendant to transmit the funds to plaintiff and created a legally enforceable obligation on its part to make such payment (*Sayer* v. *Wynkoop, supra*; see also *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542; *Ehag Eisen. Holding AG* v. *Banca Nat. a Romaniei*, 306 N. Y. 242, 252).

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As to the second claimed basis of distinction, the illegal transaction in the relevant cases was completed only in the sense that both principals had performed their part of the illegal bargain—as Garmoja did here by paying the lire and as Corti did by transmitting the dollar equivalent—and the fruits were in the hands of an agent or depository. In all the cases, as here, one of the principals was seeking to recover the proceeds from the agent or depository, but this was regarded not as a suit to consummate the illegal bargain, but to enforce an independent promise or trust to pay over the proceeds.

The situation was quite different in *De Witt* v. *Brisbane*, 16 N. Y. 508, where one of the principals had *defaulted* and the assignee of the other principal was seeking to recover back funds advanced under the illegal contract. The *De Witt* case, which was carefully distinguished the year following in *Merritt* v. *Millard*, 5 Bosworth 645, 651-652 (N. Y. Superior Court), affirmed by this court in 4 Keyes 208, *supra*, and also in *Kellogg* v. *Adams*, 39 N. Y. 28, 32, was in the same category as *Stone* v. *Freeman*, *supra*.

Finally, by being permitted to successfully maintain the affirmative defense of illegality, defendant was enabled to avoid liability for the stated sum, which the jury verdict had fastened on it. Having been found liable for breach of contract and for negligence in the sum of $37,222, defendant, solely by virtue of the illegality of the antecedent agreement, to which it was not a party, has been allowed to escape the consequences of its own wrongdoing. This constitutes a windfall as surely as if defendant had kept the proceeds and refused to turn them over.

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Opinion of Court of Appeals of New York

So far as the Bretton Woods Agreement is concerned, we are unable to see how it affects plaintiff's right to maintain this action. The pertinent provision recites:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

While there is evidence that the applicable Italian foreign exchange regulations were "maintained and imposed consistently with" the Agreement, and while the quoted provision unquestionably prevents the courts of this State from enforcing illegal transactions in the field of international currency exchange, we do not see how this affects the New York common law rule prohibiting an agent or depository from asserting a defense of illegality which the principals have elected to waive.

Plaintiff here is seeking to enforce a *lawful* promise of payment by a party unconnected with the antecedent illegal exchange agreement. This promise was made in New York, to be performed in New York, and its enforceability is governed by New York law. The same is true of defendant's negligence, which tort was committed in New York.

The Bretton Woods Agreement adds nothing to the already settled law of this State that a party to an *illegal agreement* cannot enforce it *against the other party*. By forbidding any court in the United States from enforcing a foreign exchange contract which

violates the exchange regulations of a foreign signatory to the Agreement, it prevents a local court from refusing to give effect to the foreign law of a member on the ground that it is contrary to the public policy of the forum (see *Perutz* v. *Bohemian Discount Bank in Liquidation*, 304 N. Y. 533, 537); or because the foreign law provides only *penal* sanctions for its violation—as was the case with the Italian exchange regulations involved here—and hence should not be given extraterritorial effect (see *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 102-103). In our opinion, it in no way affects the common law rule of this State that a depository of the proceeds of an illegal transaction cannot plead the illegality of the transaction as a bar to suit against it for breach of contract and or negligence.

Accordingly, the judgment appealed from should be reversed and the verdict of the jury reinstated, with costs in this court and in the Appellate Division.

DESMOND, *J.* (dissenting):

I would affirm. We are agreed, I suppose, that the Garmoja-Corti-Anlyan-Southwestern transaction was illegal. It has been settled in this State for more than a century, beginning with *Gray* v. *Hook* (4 N. Y. 449) and the other old cases cited in *Dewitt* v. *Brisbane* (16 N. Y. 508) and continuing down through *Stone* v. *Freeman* (298 N. Y. 268) and *Carr* v. *Hoy* (2 N Y 2d 185), that the courts will under no circumstances lend their aid to the enforcement of an illegal deal. "Nor is the right to take this objection confined to the parties to the illegal transaction. A third person, whose

obligation, valid in its inception, and against which, in the hands of a legal holder, he could have no available defence, may defend himself on the ground of the illegality of the transaction through which the plaintiff derives title" (*Dewitt* v. *Brisbane*, 16 N. Y. 508, 513, *supra*). An exception to or nonapplicability of this rule has been declared in decisions like *Murray* v. *Vanderbilt* (39 Barb. 140), *Merritt* v. *Millard* (4 Heyes 208) and *Leonard* v. *Poole* (114 N. Y. 371, 378, 379) where the illegal transaction had been fully completed but one who was a mere repository for one of the parties then refused to turn over the money or property. The present is not such a case since judgment for the plaintiff here would in effect compel the taking of the final step in the transaction itself—a step without which the transaction would be meaningless—that is, the assignment to plaintiff. There is no ground for bringing this present case within the narrow *Murray-Vanderbilt* exception and so the decision below was right. It has been so often repeated in the cases that it need not be repeated again that this defense of illegality "is allowed not as a protection to a defendant but as a discharge to the plaintiff" (*Carr* v. *Hoy*, 2 N Y 2d 185, 188, *supra*, and cases therein cited). There are plenty of controlling cases which say that the "repository" exception does not apply when the whole thing is one single transaction (see, for instance, *Sayres* v. *Decker*, 239 N. Y. 73, 77). Surely, we should not be quick to extend such an exception and defeat the good old rule.

Although the point is not made in these terms by defendant, it would seem that this defendant, had it learned the purpose for which this assignment was

made, could have refused to recognize that document and could have stood on its right not to aid in carrying out an essentially illegal transaction. That being so, its position is not made worse by the fact that by error or negligence it paid out the money to the assignor instead of holding it for the assignee and thus rounding out the whole forbidden transaction.

* * * * *

Judgment reversed and the verdict of the jury reinstated, with costs in all courts. Opinion by Froessel, J. All concur except Desmond, J., who dissents in an opinion in which Dye, J., concurs.

APPENDIX D

Judgment of Supreme Court, New York County

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SOUTHWESTERN SHIPPING CORPORATION,
Plaintiff,

—against—

THE NATIONAL CITY BANK OF NEW YORK,
Defendant.

The above named plaintiff having appealed to the Court of Appeals from a judgment of the Appellate Division of this Court, First Department, entered in this action on the 24th day of October, 1958, upon the order of the said Appellate Division entered in the

office of the Clerk of That Court on October 21, 1958, affirming the judgment and order entered herein, respectively on April 7, 1958 and March 26, 1958, in the office of the Clerk of New York County, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be reversed and the verdict of the jury reinstated, with costs in all Courts, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of New York County, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court.

Now, on motion of Fink & Pavia, attorneys for the plaintiff, it is

ADJUDGED that the judgment of the Appellate Division be and the same hereby is reversed and the verdict of the jury reinstated and it is further,

ADJUDGED, that the plaintiff, Southwestern Shipping Corporation, of 105 Hudson Street, New York City, recover of the defendant, The National City Bank of New York, of 55 Wall Street, New York City, the sum of $37,222, with interest thereon amounting to $18,657.66, together with the sum of $5,207.60 costs, as taxed, making in all a total of $61,087.26, and that plaintiff have execution therefor.

Judgment entered this 31 day of July, 1959.

JAMES McGUERRIN
Clerk

Filed
Jul 31, 1959
NEW YORK COUNTY CLERK'S OFFICE

APPENDIX E

Portions of the Record Demonstrating Manner in Which Federal Question Was Raised in Trial Court

Affirmative Defense Contained in Defendant's Second Amended Answer (fols. 70-78)

AFFIRMATIVE DEFENSE

As and for an affirmative defense defendant alleges, upon information and belief:

1. Each of the causes of action alleged in the complaint arose out of or is based upon the following transaction:

(a) In or about September of 1951, at Milan, Italy, Garmoja, an Italian business entity, entered into an agreement with Sicca Dante Corti, also an Italian business entity (hereinafter referred to as "Corti") pursuant to which Corti agreed to sell and transfer to Garmoja, and Garmoja agreed to buy from Corti, $37,222 in exchange for 23,3[illegible],000 lira to be paid by Garmoja to Corti in Italy.

(b) The transfer of the said $37,222 from Corti to Garmoja was to be accomplished by a cable transfer of said amount by Corti to his agent, Armand Anlyan, in New York through an Italian bank and a New York bank and Anlyan in advance of such transfer was to assign said sum to plaintiff, and plaintiff upon receipt of said sum from the New York bank was to hold it for Garmoja.

(c) On or about September 15, 1951 the said Armand Anlyan, in Italy, pursuant to the afore-

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Affirmative Defense Contained in Defendant's Second Amended Answer

mentioned agreement, signed a letter addressed to defendant, dated September 15, 1951, in which said Armand Anlyan advised defendant that it would receive from an Italian bank $37,222 "for my account" and that he wished said amount paid to plaintiff.

(d) Pursuant to the said agreement the said letter from Armand Anlyan to defendant dated September 15, 1951 was delivered in Italy by the said Armand Anlyan to Corti and by Corti to Garmoja and then forwarded by Garmoja to plaintiff in New York and plaintiff in turn presented it to defendant as agent for Garmoja.

(e) On or about October 6, 1951 Garmoja, pursuant to the said agreement, paid to Credito Lombardo, an Italian bank in Italy, 23,310,000 lira for the account of Corti, and Corti then instructed the said Credito Lombardo to transfer $37,222 to the said Armand Anlyan in New York through defendant.

(f) On or about October 17, 1951, defendant received cable instructions from Bank of Italy to pay $37,222 to Armand Anlyan "for account of Sicca Dante Corti Prato", and defendant on or about that same date complied with such instructions.

2. Plaintiff was acting solely as agent for Garmoja in the aforementioned transaction.

3. Under the law of Italy as it existed at the time the transaction in question took place the purchase

Appendix E

Affirmative Defense Contained in Defendant's Second Amended Answer

and sale and transfer of foreign exchange was prohibited unless duly licensed by the Foreign Exchange Control Authorities of Italy.

4. No license was obtained from the Foreign Exchange Control Authorities of Italy authorizing or permitting the purchase and sale of said $37,222 by Garmoja from Corti or the transfer thereof by Armand Anlyan to plaintiff.

5. By reason of the foregoing, the said purchase and sale and transfer of the said $37,222 is, under the laws of Italy illegal and void, and as such, contrary to the public policy of the United States of America and the State of New York and unenforceable in the Courts of either.

WHEREFORE, defendant demands judgment dismissing the complaint, together with costs and disbursements in this action.

SHEARMAN & STERLING & WRIGHT,
Attorneys for Defendant,
Office & P. O. Address,
20 Exchange Place,
New York 5, New York.

(Verified by George F. Nolte, Assistant Vice-President, on December 27, 1957.)

Appendix E

Defendant's Motion for a Directed Verdict Based Upon Its Affirmative Defense

Defendant's Motion for a Directed Verdict Based Upon Its Affirmative Defense (fols. 1313-1315)

Mr. Holleran: The defendant now renews its motion to dismiss each and every one of the remaining causes of action in the complaint, those being the first, second, third, fourth, fifth, eighth and ninth, on the grounds heretofore mentioned.

Defendant also moves at this time for a directed verdict on the grounds that the contract in question is illegal under the laws of Italy and by reason of the International Monetary Fund Agreement, also known as the Bretton Woods Agreement, the Statutes of the United States, the decisions of this Court are binding upon this Court and prohibit the enforcement of any such agreement by the courts of this state if they are in violation of the foreign exchange laws of Italy.

I believe the proof here has established conclusively that such agreement, the agreement in suit, the whole transaction in suit, is in violation of the foreign exchange laws of Italy.

I therefore move for a directed verdict. There is no question of fact to be submitted to the jury.

Mr. Isler: In opposition to that, your Honor, may I to save time repeat the statements I made and the arguments I made in support of my motion to dismiss the defense, and I advance that now in support of my argument in opposition to the instant motion for a directed verdict.

The Court: The Court will reserve decision on all the motions, including, of course, the motion for a directed verdict.

Appendix E

Defendant's Motion for a Directed Verdict Based Upon Its Affirmative Defense

Defendant's Renewal of Motion for Directed Verdict Based Upon Its Affirmative Defense (fols. 1391-1392)

Mr. Holleran: Your Honor, I make a motion to set aside the verdict of the jury, the 10 to 2 verdict, on the grounds that it is contrary to the law and contrary to the evidence.

I at this time also renew my motion to dismiss the complaint for the grounds heretofore stated, and I also renew my motion for a directed verdict in favor of the defendant on its affirmative defense, your Honor.

The Court: All motions heretofore made in the course of this trial, not otherwise ruled on, are denied, except for the defendant's motion for a verdict which the Court has reserved decision on, and for the plaintiff's motion to strike the affirmative defense upon which decision is reserved.

APPENDIX F

Title 22 U. S. C.

§ 286. Acceptance of Membership by United States in International Monetary Fund.

The President is authorized to accept membership for the United States in the International Monetary Fund (hereinafter referred to as the "Fund"), and in the International Bank for Reconstruction and Development (hereinafter referred to as the "Bank"),

provided for by the Articles of Agreement of the Fund and the Articles of Agreement of the Bank as set forth in the Final Act of the United Nations Monetary and Financial Conference dated July 22, 1944, and deposited in the archives of the Department of State. July 31, 1945, c. 339, § 2, 59 Stat. 512.

§ 286h. STATUS, PRIVILEGES, AND IMMUNITIES OF THE UNITED STATES.

The provisions of article IX, sections 2 to 9, both inclusive, and the first sentence of article VIII, section 2(b), of the Articles of Agreement of the Fund, and the provisions of article VI, section 5(i), and article VII, sections 2-9, both inclusive, of the Articles of Agreement of the Bank, shall have full force and effect in the United States, and its Territories and possessions upon acceptance of membership by the United States in, and the establishment of, the Fund and the Bank, respectively. July 31, 1945, c. 339, § 11, 59 Stat. 516.

APPENDIX G

United States Statutes At Large Volume 60, Part 2, 79th Congress 2d Session, 1946, Pages 1401-1439

Articles of agreement between the United States of America and other powers respecting the International Monetary Fund. Formulated at the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1, to

Appendix G

United States Statutes At Large Volume 60, Part 2, 79th Congress 2d Session, 1946, Pages 1401-1439

July 22, 1944; signed at Washington December 27, 1945; instrument of acceptance by the United States of America deposited December 20, 1945; effective December 27, 1945.

Articles of Agreement of the International Monetary Fund

The Governments on whose behalf the present Agreement is signed agree as follows:

INTRODUCTORY ARTICLE

The International Monetary Fund is established and shall operate in accordance with the following provisions:

Article I

PURPOSES

The purposes of the International Monetary Fund are:

(i) To promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems.

(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the

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United States Statutes At Large Volume 60, Part 2, 79th Congress 2d Session, 1946, Pages 1401-1439

development of the productive resources of all members as primary objectives of economic policy.

(iii) To promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation.

(iv) To assist in the establishment of a multilateral system of payments in respect of current transactions between members and in the elimination of foreign exchange restrictions which hamper the growth of world trade.

(v) To give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity.

(vi) In accordance with the above, to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members.

The Fund shall be guided in all its decisions by the purposes set forth in this Article.

Appendix G

United States Statutes At Large Volume 60, Part 2, 79th Congress 2d Session, 1946, Pages 1401-1439

ARTICLE VIII

GENERAL OBLIGATIONS OF MEMBERS

Section 1. *Introduction*

In addition to the obligations assumed under other articles of this Agreement, each member undertakes the obligations set out in this Article.

Section 2. *Avoidance of restrictions on current payments*

(a) Subject to the provisions of Article VII, Section 3(b), and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.

(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Appendix G

United States Statutes At Large Volume 60, Part 2, 79th Congress 2d Session, 1946, Pages 1401-1439

ARTICLE XX

FINAL PROVISIONS

Section 1. *Entry into force*

This Agreement shall enter into force when it has been signed on behalf of governments having sixty-five percent of the total of the quotas set forth in Schedule A and when the instruments referred to in Section 2(a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945.

Section 2. *Signature*

(a) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 407

THE FIRST NATIONAL CITY BANK OF NEW YORK,
Petitioner,

against

SOUTHWESTERN SHIPPING CORPORATION,
Respondent.

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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Opinions Delivered in the Courts Below

Respondent merely wishes to note that the prevailing and dissenting opinions of the New York Court of Appeals have, since petitioner's brief was printed, been officially reported in 6 N. Y. 2d at pages 457 and 463, respectively.

Statement of the Case

Respondent is a New York business corporation which acts as broker, purchasing agent and freight forwarder for foreign importers. It maintains an account with petitioner bank (R. 167).*

* Unless otherwise indicated, parenthetical figures are references to folios of the Record below.

In September, 1951, Garmoja, one of respondent's customers in Italy, placed an order with respondent for 300 tons of fatty acid which respondent was to buy and ship abroad to Garmoja (R. 161). Garmoja was to pay the sum of $37,222 for this merchandise, such payment to be effected by an assignment to respondent of the necessary funds (Pl. Ex. 1A; R. 164, 1393). The assignment consists of a letter signed by one Armand Anlyan which directs petitioner to pay respondent a $37,222 credit petitioner was to receive for Anlyan's account (Pl. Ex. 2; R. 165, 1397). The letter says in terms that Anlyan's instructions to the petitioner are to be considered as "irrevocable".

Garmoja forwarded the assignment to respondent (Pl. Ex. 1-A; R. 164, 1393). Respondent thereafter delivered it to petitioner bank for the purpose of verifying the correctness of Anlyan's signature and making sure of petitioner's willingness to make the payment to respondent in accordance with its terms (Pl. Ex. 3; R. 172, Record pages 468-469). The petitioner verified as correct Anlyan's signature (Pl. Ex. 5; R. 184, 1410) and agreed that it would credit respondent's account with $37,222 on the coming in of the credit for Anlyan (R. 177-181). Respondent thereupon obligated itself to pay for the merchandise purchased for Garmoja (Pl. Ex. 6-A; R. 206, 1411). The petitioner thereafter received a cable transfer of the $37,222 (Pl. Ex. 13; R. 366, 1429-1432) but instead of crediting it to respondent's account, as it had agreed to do, petitioner, in error, paid this sum to Anlyan, who absconded.

Respondent instituted suit against petitioner to recover the monies so erroneously paid by petitioner to Anlyan. The complaint pleaded causes of action in contract and negligence (R. 19-65). Petitioner's answer pleaded denials and an affirmative defense (R. 66-78). The substance of its defense is that in 1951, at the time of the transactions involved herein, Italian citizens could not make payments in dollars out of Italy, without a license from the Italian Ex-

change Control authorities. Petitioner's claim was that Garmoja, lacking such a license to pay in dollars for the fatty acids purchased by it through respondent, entered into an agreement with another Italian firm named Corti, which did have a license to transfer dollars to Anlyan in New York, whereby the dollars to be received by Anlyan would be applied in payment of Garmoja's debt to respondent. Such a payment was to be effected by means of the assignment from Anlyan to respondent.*

Petitioner claimed that since the Garmoja-Corti agreement was not licensed by the Italian Exchange Control authorities, it was illegal, void and unenforceable under the laws of Italy and bars recovery herein by respondent because respondent's causes of action, based on the assignment from Anlyan, "arose out of" the alleged illegal Garmoja-Corti agreement (R. 71).

At the trial respondent, in support of its causes of action in contract, offered evidence of petitioner's agreement with respondent to credit respondent's account with the $37,222 upon receipt thereof (R. 167-186), and its admitted failure to do so (R. 229).

On the negligence cause, respondent offered evidence of petitioner's actual notice of the assignment, the failure of its employees to properly route notice of the assignment to the appropriate branch and department of the bank, and its subsequent misinterpretation of the cable transfer received from the Italian bank, which resulted in the erroneous payment of the $37,222 to Anlyan, instead of to respondent as assignee of those monies (R. 209-225, 315-435).

The petitioner, in defense, attempted to establish that it did not agree to credit respondent's account with the

* While petitioner's affirmative defense, as pleaded, did not reflect the fact that Corti had a license to transfer dollars to Anlyan, petitioner's counsel conceded that fact upon the trial (R. 129):

"There is no question about it here whatsoever that there was a valid license to transmit this money to Anlyan."

$37,222 upon receipt thereof, and that its handling of the transaction was not negligent.

The Trial Court, after reviewing the evidence, charged the jury (R. 1345-1346):

> "To summarize * * *. To hold the defendant bank liable you must find from all the facts and surrounding circumstances that the bank either expressly or impliedly promised to pay, upon receipt, the $37,222.00 to the plaintiff, and that such promise, express or implied, was supported by a valid consideration which I have heretofore defined to you.
>
> "If you do not find the promise and the consideration, as I have charged you, then plaintiff will have failed to have proven its case and you must find for the defendant bank."

In thus dealing with the case, the Trial Court plainly affirmed the fact that respondent was suing upon an agreement with the petitioner, having no connection whatever with the alleged Garmoja-Corti agreement in Italy.

The Trial Court then turned its attention to the respondent's claim based on its cause of action for petitioner's negligence, and again, after reviewing the evidence, charged the jury as follows (R. 1351-1352):

> "There is one other facet of this case. There are seven causes of action presented by the plaintiff in this case; one of which is based upon negligence rather than upon contractual obligation.
>
> "Plaintiff claims that the defendant bank owes it a duty. * * *
>
> "By negligence is meant that the defendant bank failed under the facts and circumstances to use that degree of care which a reasonably prudent person would be expected to use under the same or similar circumstances. Negligence is the absence of due care. Under all the facts and circumstances, as you find them to be, using as your yardstick or measuring

yardstick the reasonably prudent person under the same or similar circumstances, did the bank act carelessly and negligently?"

The Trial Court thereby correctly informed the jury of the fact that respondent's claim against petitioner also rested on the petitioner's negligence in the handling of the cable transfer which resulted in the erroneous payment to Anlyan.

The jury rendered a verdict in favor of the respondent both on the contract and negligence causes of action (R. 1383-1384).

From what has been said above, it is clear that as the basis for respondent's recovery against the petitioner, the jury found that there existed a separate legal contract between the parties and that petitioner was negligent in the handling of the cable transfer on behalf of its depositor, the respondent herein.

Despite this finding by the jury the Trial Court set aside the jury's verdict and directed a verdict in petitioner's favor solely on the basis of the affirmative defense of the illegality of the Garmoja-Corti agreement (R. 1633).

Respondent thereafter appealed to the Appellate Division of the New York State Supreme Court, First Judicial Department, which affirmed the judgment of the Trial Court, unanimously and without opinion (R. 1654-1659).

On appeal to the New York State Court of Appeals, pursuant to leave it granted on respondent's application, the judgment in favor of the petitioner was reversed and the jury's verdict in favor of the respondent was reinstated (Petitioner's Appendix G, pp. 39a-40a).

The Questions Presented

1. Does the Bretton Woods Agreement apply to the agreement determined below to be the basis of petitioner's liability for breach of contract?

2. Does the Bretton Woods Agreement afford a basis for disturbing respondent's recovery based on petitioner's negligence?

3. Does the decision below involve a federal question sufficient to invoke the jurisdiction of this Court?

Reasons for Denying the Writ

A.

Respondent's recovery for breach of contract was based on its agreement with petitioner, which the jury found, was separate and independent from the alleged antecedent illegal agreement between Garmoja and Corti (R. 1345-1346, 1383-1384).

Petitioner's agreement with respondent was made in New York and was to be performed in New York. Its enforceability is therefore governed by New York law. It did not violate the exchange regulations of Italy. It was, in the words of the Court of Appeals, an entirely "lawful" agreement (Opinion of New York Court of Appeals, Petitioner's Appendix, p. 36a).

The alleged illegal Garmoja-Corti agreement was not in any respect whatever a decisive factor in determining respondent's rights as against the petitioner Bank. It was neither pleaded nor proved by the respondent.

The Court of Apeals clearly noted that if respondent's suit had been based upon the illegal agreement between Garmoja and Corti, respondent could not have recovered

even in the absence of the Bretton Woods Agreement. Such illegal agreements are unenforceable, apart from any treaty provisions, under "well settled" New York law. To this already settled law, Article VIII, Section 2(b) of the Bretton Woods Agreement "adds nothing" since it, too, provides only for the unenforceability of *illegal* agreements (Opinion of New York Court of Appeals, Petitioner's Appendix, pp. 36a, 37a).

The Court of Appeals did not, as petitioner claims, deprive petitioner of the right to assert a defense based on the Bretton Woods Agreement. Nor did it construe that Agreement in violation of the United States' commitment thereunder. It held, merely, that the Bretton Woods Agreement has no application here inasmuch as respondent's suit was based, not upon the alleged illegal exchange agreement between Garmoja and Corti, but upon a separate, independent and lawful agreement between respondent and petitioner (Opinion of New York Court of Appeals, Petitioner's Appendix, p. 36a).

Petitioner attempts to avoid the consequences of a suit resting on the latter agreement by arguing that this separate, independent and lawful agreement between respondent and petitioner was the "final step" leading to the consummation of the alleged illegal Garmoja-Corti agreement.

This argument is without merit. As stated by the New York Court of Appeals, the Garmoja-Corti agreement was executed and completed in Italy by Garmoja's payment of lire to Corti and Corti's transmission of the dollar equivalent. Petitioner was not a party to that agreement. It was merely a conduit through which the moneys were transmitted. It had no beneficial interest in or a claim to the moneys. Its position was merely that of a depository into whose hands moneys were delivered for payment to the respondent (Opinion of New York Court of Appeals, Petitioner's Appendix, pp. 33a, 35a).

Petitioner also makes the argument that the words "exchange contract" appearing in Article VIII, Section 2(b) of the Bretton Woods Agreement should be given a broad construction so as to include the agreement made by it with respondent and which formed the basis of respondent's recovery in the Courts below. We believe that petitioner is clearly in error in making this argument. The agreement successfully relied on below by this respondent obviously was not an "exchange contract" and did not violate the exchange control regulations of any nation. The Bretton Woods Agreement is so plain and specific in what it says about "exchange contracts" so as to leave no room for construction. Its language is unambiguous and should be taken to mean exactly what it says,—"if the language be clear, it is conclusive." *Osaka Shosen Kaisha Line* v. *United States*, 300 U. S. 98, 101.

Concerning the cases cited in petitioner's brief (p. 20), it may be said that in none of them does it appear that there was ever any suggestion that the words "exchange contract" should be given the construction asserted by the petitioner.

B.

Moreover, respondent's recovery in the Courts below was also based upon a cause of action in negligence (R. 54-65). The jury's finding, affirmed by the Court of Appeals, was that the petitioner was negligent in the handling of the cable transfer and in erroneously paying the moneys to Anlyan rather than to respondent (R. 1351, 1383-1384).

Article VIII, Section 2(b) of the Bretton Woods Agreement by its terms is limited, positively and explicitly, to "exchange contracts". We cannot see how, by any reading of this Article, its language could be applied to suits in negligence.

C.

Inspection of the prevailing opinion below shows that the decision of the New York Court of Appeals may be sustained solely on grounds which are completely non-federal in character.

For example, we know that one of the decisive issues in this case is whether the petitioner was negligent. This issue was resolved against the petitioner by findings of fact (Petitioner's Appendix, p. 31a) affirmed by the Court of Appeals when it reinstated the original verdict (Petitioner's Appendix, p. 37a). The question of petitioner's negligence is clearly a question of state law having no connection with the Bretton Woods Agreement and involves no federal issue.

It will be noticed, moreover, that in reaching its decision the majority in the Court of Appeals affirmed the view that the agreement in suit was a lawful agreement having no connection with the illegal agreement involving Corti and Garmoja. After so discriminating between these agreements, the majority below ruled that since the former agreement was made in New York and was to be performed in New York, its enforceability is governed by New York law (Petitioner's Appendix, p. 36a). It is the submission of this respondent that the decision of these questions as to the separability and enforceability of the agreement between petitioner and respondent rests entirely upon a construction of the agreement itself and upon the application of state law. Again no federal question is involved.

It will be noticed, finally, that the decision below is also grounded on the New York common law rule that a mere agent or depository may not in circumstances, such as are here presented, assert the defense of illegality (Petitioner's Appendix, pp. 31a-34a). This independent principle of state law makes unnecessary consideration of the federal questions urged by the petitioner. In such cir-

cumstances, they cannot be determinative of the correctness of the decision below and consequently can raise no federal question on this application.

From what has been said above, it is apparent that the controlling issues in this case do not arise under federal laws or treaties, but rather do arise wholly under state law. Accordingly, it is our submission that this Court, in the exercise of its discretion, should decline to take jurisdiction of the present case.

CONCLUSION

It is respectfully submitted that the present case is not a proper one for review by certiorari in this Court. The petition for a writ should therefore be denied.

Respectfully submitted,

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against

SOUTHWESTERN SHIPPING CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's Opposing Brief seeks to create the impression that its claim against Petitioner was separate and independent of the illegal agreement pleaded by Petitioner in its affirmative defense; and that the Trial Court and the jury verdict so determined. We respectfully submit this Reply Brief for purpose of clarification.

The complaint was based upon the Anlyan assignment which in turn was an essential part of the illegal Garmoja-Corti exchange deal.

The Anlyan assignment was specifically referred to in eight of Respondent's nine causes of action in the complaint. (See pars. 8, 9, 16, 17, 18, 19, 20, 27, 28,

30, 33, 34, 39, 45, 46, 53, 54, 55, 56, 57, and 61 of the complaint, which appears at fols. 19-65 of the record.) Petitioner pleaded in its affirmative defense that each of the causes of action alleged in the complaint was based upon the Garmoja-Corti exchange deal, of which the Anlyan assignment was an essential part. (fols. 71-75).

The Trial Court in its charge to the jury was careful to instruct the jury that it should not concern itself with the allegations of the affirmative defense:

> "The defendant has further asserted an affirmative defense alleging that the arrangement in Italy was an illegal one. You, as members of the jury, are not to concern yourself in anywise with this defense. Whatever the law of Italy may be, and whether the arrangement was legal or illegal, is purely a matter of law with which you are not concerned, and upon which this Court will rule at the proper time.
>
> You are to concern yourselves only with the proof by both sides with the transaction involved between the plaintiff and the defendant, disregarding completely the affirmative defense in your determination." (1330-1331)

Accordingly the jury never had any reason to consider the scope of the Garmoja-Corti agreement. This consideration was left to the Trial Court.

The conclusion of the Trial Court was as follows:

> "However, the sum total of evidence, in my opinion, conclusively and unequivocally establishes that plaintiff's complaint and proof is predicated upon the assignment and the Garmoja-

Corti agreement, both of which, as I have pointed out, are illegal by the laws of Italy." (1611-1612)

This conclusion was amply supported by the testimony of the Respondent's own officers and stockholders.

"Mr. Garavaglia testified:

'Mr. Garavaglia: No. It was Mr. Corti who was desirous of fixing up this transaction of his, and he, therefore, offered it to us, as we were importers, and it was customary for these transactions to be in demand or offered.

Mr. Holleran: What was it that Mr. Corti offered to you?

Mr. Garavaglia: Mr. Corti offered us the purchase of $37,222. which he had available from an importation transaction already performed between Credito Lombardo and Armand Anlyan.

Mr. Holleran: You accepted that offer, did you?

Mr. Garavaglia: Yes.

Mr. Holleran: As a part of that transaction Mr. Corti delivered to you Defendant's Exhibit 5, which is a letter from Armand Anlyan to the National City Bank, dated September 15, 1951?

Mr. Fink: Objection.

Mr. Garavaglia: Yes.' (659-660)

Later on he testified again:

'Mr. Holleran: When you paid that 23-odd million lire to Credito, you expected to receive in exchange for it the $37,222. in New York, did you not?

Mr. Garavaglia: Yes, that is, the Southwestern Shipping Corporation was to receive it.'

* * * *

'Mr. Holleran: And the Southwestern Shipping Corporation was to hold the money for Garmoja was it not?

Mr. Garavaglia: Yes.

Mr. Holleran: As a part of that transaction Mr. Corti delivered to you Defendant's Exhibit 5, which is a letter from Armand Anlyan to the National City Bank dated September 15, 1951?

Mr. Fink: Objection.

Mr. Garavaglia: Yes.

Mr. Holleran: And in furtherance of that transaction did you deposit 23-odd million lire with Credito Lombardo on October 6, 1951, as shown in Defendant's Exhibit 6?

Mr. Fink: Objection.

Mr. Garavaglia: Yes.

Mr. Holleran: It was all part of one transaction then, was it not?

Mr. Fink: Objection.

Mr. Garavaglia: Yes.' (743-746)

Mr. Mojana, an officer and principal of both Garmoja and Southwestern, testified:

'Q. Now are you familiar with the terms of the verbal agreement which existed between Garmoja and Corti? A. Not thoroughly. Anyhow, it is quite clear that I was familiar with the transaction itself.

Q. Well, I wish you would tell me what you mean by the transaction itself, and by the facts

which go to make up the transaction? A. Of the purchase of the exchange.

Q. You were familiar with the purchase of the exchange from Corti? A. Yes.'

* * * *

'Q. You have testified, Mr. Mojana, that Garmoja bought U. S. dollars from Corti? A. Yes.

Q. Was it the expectation of Garmoja that Corti would deliver these dollars in New York? A. Yes.

Q. Did Corti agree to do that? A. Yes; not only that, but he delivered to us the letter of Aulyan guaranteeing that the amount would have arrived to us. He personally delivered that letter to Mr. Garavaglia.'" (485-488)

It is not necessary here to take issue with the characterization on page 3 of the Opposing Brief of the evidence adduced on Respondent's "negligence" cause of action. Each of Respondent's causes of action, whether in contract or in tort, was based upon the illegal Aulyan assignment; and this assignment was an integral part of the illegal Garmoja-Corti exchange contract.

The Federal questions presented have not been foreclosed by the charge of the Trial Court or by the jury verdict.

The Federal questions presented by this case were raised by the Petitioner's affirmative defense. Since the jury was told not to concern itself with the allegations of this affirmative defense its verdict obviously has not resolved the Federal questions.

The Trial Court made findings of fact in support of Petitioner's allegations in the affirmative defense, and it ruled upon the facts so found as a matter of law that the Bretton Woods International Monetary Agreement precluded a recovery by Respondent. The New York Court of Appeals has ruled otherwise as a matter of law, two judges dissenting.

The opinion of the Court of Appeals is based upon the legal proposition that because of its status in the transaction Petitioner is precluded by the New York law and public policy from asserting the affirmative defense of illegality based upon an international agreement of the United States. As the case now stands Petitioner has pleaded and proved factually that a recovery by Respondent would violate the Italian foreign exchange regulations and would therefore contravene the provisions of the Bretton Woods International Monetary Agreement.

The Federal questions which are presented by this record and which we ask this Court to consider have not been foreclosed either by the Trial Court or by the verdict of the jury.

Respectfully submitted,

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